No. 89-1836

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

REPLY BRIEF OF PETITIONER

MICHAEL E. TIGAR *
University of Texas School of Law
SAMUEL J. BUFFONE
TERRANCE G. REED
ASBILL, JUNKIN, MYERS & BUFFONE
CHARTERED
1615 New Hampshire Avenue, N.W.
Washington, D.C. 20009
(202) 234-9000
NEIL G. GALATZ
Las Vegas, Nevada
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. ATTORNEY SPEECH AND FAIR TRIALS ARE NOT INCOMPATIBLE	2
II. RESPONDENT HAS FAILED TO JUSTIFY A SPECIAL STATUS FOR ATTORNEY SPEECH	9
III. THE RULE IS BOTH VAGUE AND OVERBROAD	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES

	Page
Alderman v. United States, 394 U.S. 165 (1969)	7
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	5
Bridges v. California, 314 U.S. 252 (1941)	1, 11, 13, 14
Cammer v. United States, 350 U.S. 399 (1956)	11
Craig v. Harney, 331 U.S. 367 (1947)	12, 13
Eaton v. Tulsa, 415 U.S. 697 (1974)	11
First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	4
Hirshkop v. Snead, 594 F.2d 356 (4th Cir. 1979)	15
In re Little, 404 U.S. 697 (1974)	11
In re Sawyer, 360 U.S. 622 (1959)	10, 12, 13
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	14
Levine v. United States Dist. Court for the Cent. Dist. of California, 764 F.2d 590 (9th Cir. 1985)	3
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)	1, 3
Pennekamp v. Florida, 328 U.S. 331 (1946)	13
Procunier v. Martinez, 416 U.S. 396 (1974)	4
Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)	7
Stroble v. California, 343 U.S. 181 (1952)	9
Virginia Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976)	5
Wayte v. United States, 470 U.S. 598 (1985)	4
Wood v. Georgia, 370 U.S. 375 (1962)	11, 14

RULES AND STANDARDS

Nev. S. Ct. Rule 177	*passim*
ABA Model Rule 3.5	7
ABA Model Rule 3.6	11, 14
ABA Model Rule 4.2	5
Standard 8-1.1(a) of the ABA Standards Relating to the Administration of Criminal Justice	3

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Page
ABA, Alternate Draft of the Model Rules of Professional Conduct (1981)	14
Curtin, *"Killing" All the Lawyers*, ABA Journal 8 (September 1990)	10
L. Friedman, *A History of American Law* (2d ed. 1985)	10
Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?* 75 Iowa L. Rev. 601 (1990)	7
Zunker, *Public Perception of the Legal Profession*, Texas Bar Journal 78 (January 1985)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

REPLY BRIEF OF PETITIONER

INTRODUCTION

Respondent and amicus Solicitor General urge this Court to find, on this record, an irreconcilable conflict between First Amendment free speech and Sixth Amendment fair trial interests. They ask the Court to do here what it has wisely refused to do in the past, "assign priorities as between First Amendment and Sixth Amendment rights, raising one as superior to the other." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).[1]

---

[1] *See also, Bridges v. California*, 314 U.S. 252, 260 (1941) ("For free speech and fair trials are two of the most cherished policies of our civilation, and it would be a trying task to choose between them").

Respondent and amicus conjure up this constitutional collision by asserting that a special class of speakers—lawyers—are entirely excluded from claiming the same First Amendment rights afforded all other speakers. By contrast, Petitioner asks this Court to follow its prior precedent, and to reconcile the competing constitutional interests, by upholding the traditional idea that less restrictive alternatives to content-based suppression of truthful speech will protect litigants and the justice system from unfair trials. In particular, Petitioner submits that fair trials and free speech by lawyers can co-exist, and the record in this case offers ample, uncontradicted, evidence that this is so.

Moreover, this Court's precedent demonstrates that the way to avoid a collision between free speech rights and fair trial interests lies in application of the working principles developed under the clear and present danger test. Respondent would avoid a careful assessment of the alleged threat to fair trial interests claimed to exist in *this* case, and would further ask this Court to ignore the traditional judicial practices which can, and did here, ensure both trial fairness and speech rights. To create a constitutional confrontation between the Sixth and First Amendments, the State Bar and amicus ask the Court to find that the judicial use of available less restrictive means of preserving fair trials creates sufficient independent harm to fair trial interests to justify speech suppression. As we spell out below, the justice system provides ample constitutionally permissible devices to hold lawyers to their oaths.

I. ATTORNEY SPEECH AND FAIR TRIALS ARE NOT INCOMPATIBLE.

The record in this case, as acknowledged by the Nevada Supreme Court, establishes that Mr. Gentile's comments caused no *actual* prejudice to the *Sanders* case. (Cert. App. 4a). Moreover, the Bar presented no direct evidence

of *potential* prejudice flowing from Mr. Gentile's remarks. Even the American Bar Association, appearing as amicus in support of its Rule, does not contend that the Rule applies to the facts of this case. ABA Amicus Brief, at 2 n.2.

Confronted with the absence of any record basis to sustain a finding of potential prejudice, Respondent attempts to divert this Court's attention by offering a series of inapposite hypotheticals which it claims are the necessary consequence of sustaining the First Amendment interests at stake in this case.[2] Respondent's "parade of horribles" begins with criticism of this Court's *Nebraska Press* opinion as establishing an unworkable and impossibly stringent standard,[3] one which would force burdensome trial management efforts upon courts to protect against even the most egregious examples of attorney speech. Respondent's Brief, at 12. Respondent then portrays Petitioner's arguments as requiring absolute deference to the protection of attorney speech regardless of the consequence to the fair administration of justice. In the process, Respondent rejects any possible compatibility between attorney speech and Sixth Amendment fair

---

[2] Respondent also seeks to divert the Court's attention from the specific factual findings made below, in which the Disciplinary Board identified only six statements as ethical violations (JA. 2-3), by arguing that other statements made by Mr. Gentile which were not the subject of discipline also violated various ethical rules. *See, e.g.*, Respondent's Brief, at 2, 36.

[3] Contrary to Respondent's expressed concern that the *Nebraska Press* standard is unworkable as applied to counsel, federal courts have issued gag orders on counsel using a clear and present danger test. *See, e.g., Levine v. United States Dist. Court for the Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985). This allegedly unworkable standard has been employed without difficulty by the ABA and by several states. *See* Standard 8-1.1(a) of ABA Standards Relating to the Administration of Criminal Justice (1978); Respondent's Brief, at 20 n.21 (listing states which have adopted clear and present danger test). Indeed, California has *no* ethical rule relating to attorney speech on pending litigation.

trial interests. Respondent's error lies not only in its mischaracterization of Petitioner's position but, more fundamentally, in a misapprehension of this Court's teaching.

Where the State seeks to suppress presumptively protected speech, it must establish both that the practice in question furthers a substantial government interest and that the proposed limitations on speech are no greater than necessary to protect the identified governmental interest. *See Wayte v. United States*, 470 U.S. 598 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Procunier v. Martinez*, 416 U.S. 396 (1974). The first step in this analysis is for the State to define the countervailing interest it seeks to protect, and to establish its importance *vis a vis* speech rights.

Here, despite the repeated references in the briefs of Respondent and the Solicitor General to the State's interest in a fair trial, their argument reveals that the interest they seek to protect is not that of a fair trial, but rather a more general interest in limiting speech by attorneys. For example, the Solicitor General contends that speech about pending litigation by a non-lawyer is fully protected by the First Amendment, and suggests that defendants can make the same statements uttered here either directly or through non-lawyer spokespersons. Solicitor General's Amicus Brief, at 7. The Solicitor General suggests that while non-lawyers may freely disseminate information prejudicial to fair interests, the same information cannot be uttered by lawyers. *Id.* at 25. The Solicitor General even asserts that the prosecution cannot be held accountable for speech by its agents, including the police. *Id.* at 23 n.15. Respondent would also accept other potential sources of comment on the judicial process, arguing that the press and non-participants in the trial process are afforded full First Amendment protection. Respondent's Brief, at 21.

Such selective prohibition of speech prejudicial of fair trial interests is incompatible not only with the justice system's need to preserve fair trials but also with the State's obligation to provide them, Hence, the willingness of the Solicitor General and Respondent to authorize prejudicial speech by non-lawyers demonstrates that the State is not seeking to further fair trials, but rather its generic interest in regulating attorneys. As against this narrow State interest,[4] the First Amendment takes precedence.[5]

---

[4] The nature of this interest has not been clearly articulated by Respondent. Even the ABA, which similarly contends that trial fairness is not the only interest justifying its Rule, *see* ABA Amicus Brief, at 7, fails to clarify what this interest is. This Court has held that the suppression of attorney speech to foster "professionalism" cannot withstand First Amendment scrutiny. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). *Cf. Virginia Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770 (1976) (legislature may not suppress informative pharmacist speech in order to protect reputation of profession).

[5] Indeed substantial doubt exists whether the Solicitor General believes that the rules of ethics it seeks to enforce here would apply to prosecutors. The Solicitor argues that a lawyer's license, presumably including that of prosecutors, carries with it ethical obligations that limit speech, and offers as an example the ethical prohibition on communications with persons represented by counsel. *See* Solicitor General's Amicus Brief, at 17, citing ABA Model Rule 4.2. Assistant Attorney General Robert S. Mueller, who is a signatory to the Solicitor's brief, has taken a contrary position in other pending federal litigation. In *United States v. Lopez*, Cr. 89-0687 (N.D. Cal.), Mr. Mueller filed a "Brief Of The Criminal Division Of The Department Of Justice" on February 11, 1991 in which he argued that this very ethical rule did not apply to federal prosecutors due to the Supremacy Clause and also because the separation of powers doctrine limits the ability of federal courts to impose ethical rules on federal prosecutors. Respondent distances itself from this public position of the Attorney General when it argues that "it seems highly likely that the state bar's ethical provisions will be recognized as binding on federal prosecutors, as a matter of federal common law." Respondent's Brief at n.33, p. 34.

Respondent also fails to demonstrate that the means chosen to vindicate this asserted State interest, here the discipline of Petitioner, is no greater an infringement on speech rights than is necessary to protect the State's interest. Petitioner fully agrees with the contention of the Solicitor General that lawyers have a duty not to make comments prejudicial to a fair trial. Solicitor General's Amicus Brief, at 7. Here, no such prejudicial comments were made. The narrower issue this case presents is what the State Bar must show to punish speech that does *not* prejudice fair trial rights.

Lacking evidence of actual or potential prejudice in the record, Respondent and its amici turn to extreme hypothetical cases to argue that lawyers can cause prejudice. For example, Respondent expresses concern about lawyer commentary on inadmissible evidence, and the Solicitor General worries that the First Amendment will be used to justify breaches of a lawyer's duty to maintain client confidences or to violate the ethical prohibition on contacting represented parties.[6] The concerns are real, but the proposed response is wrong, especially under the circumstances of this case, where none of these concerns are present.

Certainly, publication of inadmissible material, as the police did in the *Sanders* case with the public announcement of lie detector and drug test results, is a significant step closer to a serious threat of prejudice, and in appropriate circumstances may constitute a clear and present danger to fair trial interests. No such speech was made by Petitioner here. Similarly, the First Amendment should offer no defense for the breach of a lawyer's duty to maintain client confidences any more than it shields a lawyer who discloses national security secrets or third party privacy matters that are the subject of a protective order. *See Seattle Times Co. v. Rhinehart*, 467

[6] *But see* footnote 5, *supra*.

U.S. 20 (1984); *Alderman v. United States*, 394 U.S. 165 (1969).[7] Again, no such breach of these duties is alleged here.

Petitioner does not suggest that the First Amendment relieves attorneys of their duties to their clients or to the court. Petitioner parts company with Respondent, however, when it contends that the Sixth Amendment eliminates the free speech rights of attorneys without proof of actual prejudice or even a serious and imminent threat to fair trial interests.

Respondent's "parade of horribles" assumes that trial judges are powerless to protect themselves with anything but burdensome curative measures which would delay the trial until an impartial jury could be selected. Respondent's Brief, at 23-24. Respondent has miscast our argument as requiring such absurd results. We have conceded the authority of the trial court to utilize case management techniques, including practices ranging from *voir dire* to gag orders and contempt findings, to maintain the fair administration of justice. All parties agree that trial judges can, upon a proper showing, issue precise and specific orders to protect the fairness of trials or the privacy interests of affected parties. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Alderman v. United States*, 394 U.S. 165, 181-85 (1969). In addi-

[7] A lawyer's agreement to preserve client confidences is a contract-based limitation on speech premised on a relationship of professional employment which can be enforced by contract or tort action. Some commentators have argued that, in limited circumstances, the First Amendment does protect an attorney's disclosure of client confidences from ethical prohibitions. *See Zacharias, Rethinking Confidentiality II: Is Confidentiality Constitutional?* 75 Iowa L. Rev. 601 (1990). Obviously, the Court is not called upon to resolve this issue in this case. Similarly, any *ex parte* contact of a sitting juror by an attorney does not seek to inform the public and carries a high risk of prejudicing jurors; it can be prohibited by a gag order or by Rule, *see* ABA Model Rule 3.5, and it merits punishment under an actual prejudice or clear and present danger test.

tion, trial lawyers, no strangers to the doctrine of waiver, will not create prejudicial publicity in the vain hope that a court will be sympathetic to a request to cure a problem of the lawyer's making.[8]

Finally, if an inflammatory press conference is held by the prosecution or defense on eve of trial, it may result in swift and certain punishment by contempt either because it violates a gag order or because it constitutes misconduct. In this electronic age, the evidence of such misconduct would be near at hand, and it would readily be used to sustain a finding of a clear and present danger to the proceedings.

Indeed this case provides a cogent example of how Respondent has overstated the problem, and trivialized the available remedies that do not infringe the right of free speech. Neither the state prosecutor nor the trial court raised any claim of prejudice in the *Sanders* case. Hence, those with the greatest interest in identifying actual or potential prejudice from Mr. Gentile's remarks claimed none. The trial court simply engaged in traditional voir dire, which it employed with no adverse effect on trial fairness or efficiency. Faced with a record barren of any prejudice, Respondent substitutes for such evidence the speculation that the timing of Mr. Gentile's comments renders them especially likely to prejudice prospective jurors. This argument also lacks merit.

Mr. Gentile's comments occurred on the day of his client's arraignment, the same day that Mr. Gentile learned of the scheduling of a trial date some six months in the future. Respondent, and the Nevada Supreme Court, have inferred from the timing of Petitioner's statements that it was chosen to maximize the potential prejudice because of alleged increased public attention to the case at the time of arraignment. To the contrary,

[8] *See also*, Petitioner's Brief, at 39 (describing tactical reasons why defense attorneys are reluctant to speak about pending matters).

and as the record bears out, Mr. Gentile's comments were timed to have the least possible impact on fair trial interests.

As Mr. Gentile testified below,[9] after researching the issue, he relied on this Court's prior precedent sustaining the fairness of a capital trial because six weeks was a sufficient time to dissipate any potential prejudice from the prosecution's public disclosure of the defendant's incriminating confession. *See Stroble v. California*, 343 U.S. 181 (1952). Here, Mr. Gentile knew that the trial would take place at least six *months* after the date of arraignment, a far more substantial period of time for the dissipation of any potential prejudice. Moreover, the press accounts of the *Sanders* case bear out this assessment: most of the media attention is clustered around either the early police disclosures or the *Sanders* trial. *See* J.A. 84-134. Mr. Gentile's comments were made when trial was not imminent. Accordingly, Mr. Gentile's remarks were appropriately timed not to pose a risk of potential prejudice.

II. RESPONDENT HAS FAILED TO JUSTIFY A SPECIAL STATUS FOR ATTORNEY SPEECH.

Lacking proof of prejudice from Mr. Gentile's comments, the State Bar and the Solicitor General offers a more general argument that attorneys enjoy unique credibility with the public, and argue therefore that attorney speech always represents a special danger of causing prejudice in all circumstances. Of course, they offer no empirical or other evidence to support this conclusion. Nor has the State Bar or supporting amici responded to the uniform conclusion of researchers, as cited in Petitioner's opening brief,[10] that the general risk of juror prejudice from all extrajudicial speech, including attor-

[9] J.A. 59-60.

[10] Petitioner's Brief, at 29-30.

ney speech, is negligible. Before an attorney can be believed he must be heard, and the *voir dire* in this case, as well as the available research, indicate that there is no substantial risk of prospective juror exposure to lawyer speech.

Respondent posits that the public attaches greater credibility to attorney speech than that of all other speakers. The hard reality is to the contrary. *See* L. Friedman, *A History of American Law* 303-05 (2d ed. 1985) (detailing low esteem in which lawyers held by American public beginning in colonial period).[11]

Wholly apart from the issue of lawyer credibility generally, the public is equally if not more likely to discount the speech of lawyers as that of a partisan advocate of a client.[12] This public reaction is especially likely when an attorney is an advocate against the amassed institutional credibility of the State and its agents.

Most significant for constitutional purposes, the posited "special impact" of lawyer speech upon the public is completely conjectural, and is not supported either by the record in this case or by *any* supporting empirical study.[13]

---

[11] *See also*, Curtin, *"Killing" All the Lawyers*, ABA Journal 8 (September 1990) (describing low public image of lawyers); Zunker, *Public Perception of the Legal Profession*, Texas Bar Journal 78 (January 1985) (lawyers will never win popularity contest because every lawsuit has a loser, and delays inherent in judicial process; lawyers "need to recognize and accept certain realities about . . . how the public perceives us.")

[12] *See Friedman, supra*, at 304. ("At various points in history, the lawyer has been labeled a Tory, parasite, userer, land speculator, corrupter of the legislature, note shaver, panderer to corporations, tool of the trusts, shyster, ambulance chaser, and loan shark. Some of his bad odor is due to his role as hired hand. The rich and powerful need lawyers and have the money to hire them.").

[13] This brand of speculation is similar to that rejected in *In re Sawyer*, 360 U.S. 622 (1959), where the government sought to justify attorney discipline by arguing that attorney claims of judicial error cause public doubt about judicial integrity. In the judgment of this Court, "We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others." *Id.* at 635.

In fact, neither the drafters of ABA Model Rule 3.6, nor the ABA's Amicus Brief, mention lawyer credibility as a reason for the suppression of lawyer speech.

In constructing its novel "special status" argument, Respondent attempts to sidestep this Court's precedent applying the clear and present danger test to speech concerning pending litigation by arguing that these cases only dealt with press rights,[14] while the Solicitor General tries to avoid these cases by arguing that they involved only the speech rights of non-participants in the pending litigation.[15] Neither contention is accurate. In addition, Respondent simply ignores this Courts' prior holding in *Wood v. Georgia*, 370 U.S. 375 (1962), a case that rejected Respondent's principal argument that a speaker's status as an "officer of the court" eliminates his First Amendment rights.[16]

That this Court's free speech precedent protects speech about pending litigation by speakers other than the press is established by several cases. *See, e.g., Bridges v. California*, 314 U.S. 252, 276 (1941) (telegram by union representative to Secretary of Labor about pending union case); *Wood v. Georgia*, (letter from county sheriff to sitting grand jury); *Eaton v. Tulsa*, 415 U.S. 697 (1974) (speech by witness in criminal trial); *In re Little*, 404 U.S. 697 (1974) (speech by defendant in criminal trial).

---

[14] Respondent's Brief, at 12-13.

[15] Solicitor General's Brief, at 11 (cases enunciating clear and present danger principle "have all addressed the relationship between the judicial system and outsiders to the system.")

[16] The *Wood* case involved a county sheriff, an acknowledged officer of the court. In *Cammer v. United States*, 350 U.S. 399 (1956), this Court, held that, unlike bailiffs and marshals, lawyers are not "officers" of the court "within the conventional meaning of that term." *Id.* at 405.

In each of these cases, this Court employed the same test that the Court has applied to speech by the press. *See, e.g., Craig v. Harney*, 331 U.S. 367 (1947). Similarly, these cases refute the Solicitor General's contention that this Court has only provided full First Amendment protection to speakers who are not participants in pending litigation. *See also* Petitioner's Brief, at 16-18 (colonial tradition of lawyer commentary on pending litigation).

Respondent's search for some explanation why this Court should abandon the "working principles" fashioned over the last half century to accommodate both free speech and fair trial interests ultimately comes to rest upon the dissenting and concurring opinion in *In re Sawyer*, 360 U.S. 622 (1959), while ignoring the actual holding of that case.[17]

In the *Sawyer* case, an attorney had been disciplined for making a public speech about a pending Smith Act trial in which she was defense counsel. The attorney's comments ranged from criticism of the trial proceedings to challenging the testimony of government witnesses, with a general characterization of the proceeding as shocking and unfair. Five Justices joined in a judgment of the Court holding that the disciplinary authorities did not, as a factual matter, prove that the attorney's comments impugned the integrity of the trial court, the charge for which discipline was imposed. *Id.* at 625. In the words of Justice Brennan, "Speculation cannot take over where the proofs fail." *Id.* at 628. Most significant for this case, the Court held:

> Since no obstruction or attempt at obstruction of the trial was charged, and since it is clear that the finding upon which the suspension rests is not supportable by the evidence adduced, *we have no occasion to consider the applicability of Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); or Craig v. Harney, 331 U.S. 367 (1947), which have been extensively discussed in the briefs. We do not reach or intimate any conclusion on the constitutional issues presented.*

Id. at 626-27 (emphasis added; parallel citations omitted).

Accordingly, the *Sawyer* opinion did *not* resolve the constitutional issue raised here, although the Court did acknowledge that it reviewed the facts under the same vigorous standard of review applicable to First Amendment claims.[18] More important, the *Sawyer* opinion identified the very cases Petitioner has previously cited as relevant to this case—*Bridges*, *Pennekamp*, and *Craig*—as pertinent authority for the resolution of this reserved constitutional issue.

To claim that five Justices in *Sawyer* voted for its view of the law, Respondent stitches Justice Stewart's concurrence together with the opinions of four dissenters. This argument evaporates when one reads Justice Stewart's words: he began with a justified encomium to lawyer's ethics, and he then noted that a professional obligation to keep client confidences could not be overcome by a claim of free speech. While we agree, this statement does not support Respondent's broad view. Finally, Justice Stewart noted, as had the plurality, that the case would be different if it involved an "attempt to obstruct or prejudice the due administration of justice." Because that

---

[17] Respondent chides Petitioner for not citing *Sawyer*. Respondent's Brief, at 14 n.12. In fact, Petitioner cited and quoted from the *Sawyer* opinion in the petition for certiorari and correctly noted that the Court declined to rule upon the constitutional issue raised in this case. Pet. at 6 n.1.

[18] 360 U.S. at 640. The Respondent attempts to conceal the significance of the *Sawyer* opinion's plenary review by suggesting that the Court's searching factual review was prompted by the territorial jurisdiction of the Hawaii courts, not by the Court's constitutional precedent. *Compare* Respondent's Brief, at 13 n.11 *with Sawyer*, 360 U.S. at 640.

case did not, as the present case does not, Justice Stewart declined to join what he termed the "dissenting opinion."

III. THE RULE IS BOTH VAGUE AND OVERBROAD.

The briefs of the State Bar and amici serve to strengthen Petitioner's contention that Rule 177 is both vague and overbroad. None of the responding briefs offers any reconciliation between the categories of speech proscribed in Rule 177(2) and the simultaneous protection offered such speech in Rule 177(3). Nor has Respondent or amici attempted to explain what is meant by Rule 177(3)'s authorization of otherwise prohibited speech as long as it is "without elaboration." As Petitioner explained in his testimony below, one section of the Rule appears to prohibit precisely what the other section approves. (J.A. 59). Unfortunately, in determining the proper limits of his speech, Petitioner could not, as have Respondent and supporting amici, simply ignore the apparent ambiguities in the Rule.[19]

---

[19] The ABA's amicus brief has disclosed a more basic ambiguity in the standard applied in this case. The ABA's brief asserts, without citation, that the "substantial likelihood" of prejudice test of Rule 177(1) is different from, and less speech protective than, the clear and present danger test. ABA Amicus Brief, at 12. *Accord*, Respondent's Brief, at 27 n.26. The drafters of Model Rule 3.6, however, indicated that they chose this standard because it was equivalent to the clear and present danger standard. ABA, Alternate Draft of Model Rules of Professional Conduct 275 (1981) (language of what would become Rule 3.6 "incorporates a standard approximating clear and present danger" test and requires a "serious and imminent threat" of prejudice, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *Wood v. Georgia*, 370 U.S. 375 (1962); *Bridges v. California*, 314 U.S. 252, 273 (1941)). The Solicitor General has also previously asserted that the "substantial likelihood" test of Model Rule 3.6 was equivalent to a clear and present danger test. Pet. Amicus Brief of Solicitor General, at 10. When the authors and supporters of a Rule cannot agree on its meaning, it can hardly be considered pellucid. This persistent uncertainty as to what, precisely, is the standard articulated in Rule 177(1), both underscores it vagueness and offers yet another reason not to depart from the longstanding working principles of the clear and present danger test.

In addition, Respondent offers *no* response to Petitioner's overbreadth challenge [20] other than to deny that Petitioner has challenged the Rule on overbreadth grounds, and to assert that the categories of speech identified in the Rule are sufficiently narrow. Respondent's Brief, at 31-32. The Solicitor General, in turn, denies that the Rule prohibits categories of speech. Solicitor General's Amicus Brief, at 28. Neither offer any suggestion as to how Petitioner's speech violated the Rule other than to repeat that it fell within one of the proscribed categories of speech.

Finally, Respondent suggests that the Rule is not overbroad because its broad language will not be literally enforced.[21] Respondent and amici strive mightily to offer narrow, if contradictory,[22] interpretations of the Rule. For example, the applicability of Rule 177(2)'s prohibitions to bench trials are justified solely because they will rarely be invoked.[23] The extensive breadth of the Rule cannot be justified by giving unbridled discretion to its enforcers to pick and choose the targets of its enforcement. The attorney discipline in this case teaches that lesson.

---

[20] *See* Petitioner's Brief, at 48-49.

[21] *See, e.g.*, Respondent's Brief, at 31 n.31, 32 n.32.

[22] For example, Respondent argues that intent is not an element of an ethical violation, while the Solicitor General believes it is. *Compare* Respondent's Brief, at 32 n.32 *with* Solicitor General's Brief, at 7, 29 n.16.

[23] Respondent's Brief, at 32 n.32; Solicitor General's Brief, at 28 n.16. *But see Hirshkop v. Snead*, 594 F.2d 356, 371-72 (4th Cir. 1979) (en banc) (disciplinary rule prohibiting extrajudicial attorney speech in bench trials unconstitutional after *Pennekamp*).

CONCLUSION

For the foregoing reasons, the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

MICHAEL E. TIGAR *
University of Texas School of Law

SAMUEL J. BUFFONE
TERRANCE G. REED
ASBILL, JUNKIN, MYERS & BUFFONE
CHARTERED
1615 New Hampshire Avenue, N.W.
Washington, D.C. 20009
(202) 234-9000

NEIL G. GALATZ
Las Vegas, Nevada

* Counsel of Record